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SUPREME COURT, U.S.
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No. 99-870

In The

Supreme Court of the United States

G. GORDON LIDDY,

Petitioner,

v.

IDA MAXWELL WELLS,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT

The Court should deny the instant Petition for a Writ of Certiorari. It lacks merit both factually and legally.

Petitioner has made speeches asserting that in 1971-72 there was a prostitution ring operating out of the Democratic National Committee headquarters in the Watergate Office building; that respondent was the operator of the prostitution ring; that respondent used the telephone that petitioner caused to be tapped to set up prostitution liaisons between prostitutes and visiting Democratic Party Officials; that Maureen Biner, later Maureen Dean, then the fiancée of the Counsel to President Richard M. Nixon, was one of the prostitutes; that photographs of Ms. Biner in suggestive poses were among pictures in respondent's desk that respondent showed to Democratic Party officials; and that it was John Dean and not petitioner who orchestrated the famous June 17, 1972, break-in of the DNC and he did that to remove his fiancée's photographs. App. 2a-13a. The charges are not only false, they are incredible and based on a totally unreliable source. App. 64a-69a; *St. Armant v. Thompson*, 390 U.S. 727, 732 (1968); *Harte-Hanks Communications, Inc. v. Cannaughton*, 491 U.S. 657 (1989).

The Court of Appeals addressed the source for the statements that are the subject of the instant petition:

> [T]he district court first determined that [Phillip Mackin] Bailley was the sole source for all of the variations of the prostitution ring theories of the June 17, 1972, Watergate break-in including both *Silent Coup* and *Secret Agenda*. *See Wells*, 1 F. Supp.2d at 543. The district court also stated that Bailley, who is a disbarred attorney and

> convicted felon with a long history of substance abuse and mental illness, had changed his story about the prostitution ring several times and was not a reliable source. *See id.* . . . Bailley is the only individual who has ever made the claim that there were pictures of prostitutes in a desk at the DNC. . .
>
> During his deposition testimony Liddy verified that he was aware that Bailley was not a credible individual. Liddy was aware of Bailley's history of mental illness prior to the publication of *Silent Coup* in 1991. Liddy had been advised by counsel that he should not rely on Bailley as a sole source for any information because Bailley had "difficulty differentiating between reality and nonreality." (J.A. at 1161.) [App. 65a-68a]

Thus, the Court of Appeals concluded that the jury could find that the so-called "alternative theory to the Watergate break-in" consisted of the ravings of a single unreliable mental case – "a disbarred attorney and a convicted felon with a long history of substance abuse and mental illness." App. 65a. Petitioner actually met with Bailley and knew about his extensive psychiatric problems, including fantasies that he was an alien from another galaxy awaiting rescue. *Id.* Bailley, the ultimate in unreliable sources, moreover, has not testified under oath. He initially refused to testify at his 1996 deposition in the case of *Maureen Dean & John Dean v. St. Martin's Press, Inc.*, D.D.C., Civ. Act. No. 92-1807 (EGS), relying on his Fifth Amendment privilege against self-incrimination. Then he testified at his deposition in this case in 1997 that he had no memory of anything to do with Watergate.

Contrary to the Petition (at 2), there is no evidence "which linked Wells to a call-girl service which had an

association with certain individuals employed by the DNC." There is not a shred of evidence to support this statement. Vague and unsubstantiated rumors and allegations (all believed to emanate from the diseased mind of Bailley) are not evidence of anything.

Contrary to the Petition (at 4), the so-called call-girl theory (or, more accurately, theories) have not been "discussed and debated extensively." The theories have been a miniscule percentage of the literature, as the thinness of petitioner's footnote 1 suggests. Moreover, the most prominent citation in the footnote, to J. Anthony Lukas's book, *Nightmare: The Underside of the Nixon Years* (1976) does not mention, much less support, a theory that prostitution was behind the Watergate break-ins. Lukas stated:

> Ehrlichman, after debriefing Magruder, reported, "What they were getting [on the tapped telephone] was mostly this fellow Oliver phoning his girl friends all over the country lining up assignations." So spicy were some of the conversations on this phone that they have given rise to unconfirmed reports that the telephone was being used for some sort of call-girl service catering to congressmen and other prominent Washingtonians.

The only reasonable reading of *Nightmare* is that there was no prostitution activity. In the court below petitioner asserted, moreover, that Lukas's book is "generally regarded as an excellent exposition of the conventional theory of the break-in." *Wells v. Liddy*, No. 98-1962, 4th Cir., Brief of

Appellee at 6. Thus, it provides no support for anyone's belief in the so-called call-girl theory of Watergate.[1]

Contrary to the Petition (at 3, 4-5), Wells did not stipulate to anything relevant to the litigation in this case. *See infra.*

Contrary to the Petition (at 4), it is not a "fact" that the Watergate burglars broke into Wells's desk, even if the contention is probative of anything. Petition at 4. Wells testified at her deposition that she was uncertain whether she left her desk unlocked or whether it was broken into. Wells Dep. at 357-62.

Contrary to the Petition (at 4), it is not a "fact" that "a key to Wells' desk was confiscated from one of the burglars," even if that assertion is probative of anything. Petition at 4. Rolando Martinez, the burglar in question, vigorously denied at his deposition that he had a key to Wells's desk. *See Wells v. Liddy*, No. 98-1962, 4th Cir., Brief of Appellant at 16-17, quoting Martinez's testimony: "I never received the key, that I can say categorically and in

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[1] In footnote 1 of his Petition petitioner seeks to give the impression that the theory has been widely disseminated. That is not true. As noted, *Nightmare: The Underside of the Nixon Years* (1976) by J. Anthony Lukas makes only a passing reference to gossip. The two books that have relied on Phillip Bailley's so-called call girl theory of Watergate provide dramatically different accounts, which is the result of the authors' having spoken with Bailley at different stages of his mental illness. *See* App. 68a. The district court found that "Bailley alone, however, appears to have been the ultimate source for all of these publications." App. 92a. The book that comes closest to petitioner's recitation is *Silent Coup*. John Dean and Maureen Dean sued Bailley, the authors (Len Colodny and Robert Gettlin) and publisher (St. Martin's Press, Inc.) of *Silent Coup* as well as petitioner. The first four have settled with Mr. and Mrs. Dean. The book is no longer in print. Only petitioner remains as a defendant in the lawsuit brought by Mr. and Mrs. Dean. *Dean v. St. Martin's Press, Inc., supra.* Finally, the National Review article and the television shows are about *Silent Coup* and petitioner's *Will* and occurred after petitioner started promoting the call-girl scenario in which John Dean, Maureen Dean, and respondent played roles and the Deans had filed their lawsuit.

front of any court of law, in front of God, in front of everyone, I never received the key for [sic] anyone." Martinez had previously denied possession of any key, as petitioner knew. *E.g.*, Liddy Deposition, Nov. 4, 1997, at 86-87.

Contrary to the Petition (at 5), it is not a fact that "Liddy also came to believe that the real purpose of the break-in was not to repair this [call girl related]_wire-tap." The Court of Appeals reversed on the ground that the jury could find that petitioner did not believe that. App. 64a-69a.

REASONS FOR DENYING THE WRIT

I. *WELLS v. LIDDY* DOES NOT FAIRLY RAISE THE ISSUE OF THE SCOPE OF THE CONCEPT OF INVOLUNTARY PUBLIC FIGURES.

Petitioner seeks a grant of *certiorari*. He asks the Court to decide whether, to fulfill the requirements to become an involuntary public figure, a defendant must establish that the plaintiff undertook "a course of conduct from which it is 'reasonably foreseeable . . . that public interest [will] arise,'" as well as that the plaintiff had "become a 'central figure in a significant public controversy.'" Petition at 8, 9, selectively quoting the Fourth Circuit Opinion. App. 59a-61a. The court of appeals also emphasized the requirement that "the controversy existed at the time of the alleged defamation." App. 61a. Thus, the only expression of the call-girl theory before *Silent Coup*, on which petitioner collaborated, was *Secret Agenda* by Jim Hougan, a very different theory. See Petition at 4 n. 1.

Petitioner fails to mention one crucial fact – the Fourth Circuit specifically found, after a detailed analysis of the district-court record, as a matter of fact that respondent was *not* a central figure even in petitioner's theory of

Watergate. App. 61a-63a. Thus, there is an unchallenged independent ground that prevents petitioner from prevailing in this Court.

> Wells simply has not been a central figure in media reports on Watergate. Liddy has been able to point to very few published reports on Watergate even mentioning Wells by name. . . We cannot say that in any of the reports contained in the record Wells is portrayed as a central figure in the Watergate controversy. The focus has always been on the roles of other people.
>
> This is true even of *Secret Agenda* and *Silent Coup*, the two books that are the primary proponents of the call-girl theory. . . . In the great wealth of materials on Watergate, Wells is, at most, a footnote.[2]

In fact, there is no evidence that respondent was *any* figure or played *any* role in Watergate, other than being an innocent victim of petitioner's criminal activity. As the Fourth Circuit found, the only person who has ever claimed to have personal knowledge of a call-girl ring in the Democratic National Committee headquarters at the Watergate Office Building was Phillip Bailley, who everyone agrees, petitioner included, "was not a credible individual . . . [with a] history of mental illness . . . [who] had 'difficulty differentiating between reality and nonreality.'" App. 67a. "Bailley is the only individual who

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[2] It is of course circular to argue that the fact that *Secret Agenda* and *Silent Coup* accused her of misconduct on the basis of a single unreliable source converts Wells into a public figure. *See Hutchinson v. Proxmire*, 443 U.S. 111, 115 (1979) ("those charged with defamation cannot, by their own conduct, create their own defense by making the claimant a public figure"). *See also* App. 60a n. 27.

has ever made the claim that there were pictures of prostitutes in a desk at the DNC." App. 66a. Furthermore, Bailley testified at his deposition in this case that he remembers nothing about the Watergate period. He has never testified under oath regarding his unique view of Watergate. Other evidence on which petitioner relied below was either irrelevant or vigorously disputed. Brief of Appellant, *Wells v. Liddy*, No. 98-1962, 4th Circuit, at 13-20.

Petitioner seeks to circumvent this conspicuous deficiency by making the misleading and unexplained statement that respondent "stipulated to being a 'central figure' in an alternative theory to the Watergate break-in. App. 70a-71a." Petition 3, 5.[3] The fact is that respondent's stipulation related to a radically different "alternative theory" of Watergate, the one appearing in Jim Hougan's *Secret Agenda* and one having little in common with petitioner's theory.[4] In Hougan's theory the CIA ran a call-girl ring operating out of the Columbia Plaza apartments, which is where the tapped telephone was supposedly located. Neither John Dean nor Maureen Dean played any role in that scenario. Bailley himself played an insignificant role. Other substantial differences existed. *See* App. 93a n. 9. In fact, petitioner testified that he never believed most of the thesis of *Secret Agenda*. *Wells v. Liddy*, No. 98-1962, 4th Cir., Reply Brief of Appellant at 6; *id.*, J.A. 1227-31 (Joint Appendix in court of appeals).

Respondent would not be an involuntary public figure even under *Dameron*. The District of Columbia Circuit set a very high bar. The Court relied on the fact that the plaintiff was so well known from stories about the plane

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[3] The citations to the appendix in the petition do not relate to respondent's purported stipulation. Instead they consist of the district court's articulation of the so-called call-girl theory of Watergate.

[4] Petitioner made the same misstatement in his unsuccessful petition for rehearing in the court of appeals.

crash when he was the traffic controller on duty "that he was identifiable . . . from oblique references in *The Washingtonian*." 779 F.2d at 442.

II. THE PETITION DOES NOT RELATE TO AN IMPORTANT ISSUE

Petitioner argues that the decision in this case might result in the demise of the concept of involuntary public figures. However, he does not deal with the simple fact that other than the decision in *Dameron v. Washingtonian Magazine, Inc.*, 779 F.2d 736 (D.C. Cir. 1985), *cert. denied*, 476 U.S. 1141 (1986), no one has been found to be an involuntary public figure with the possible exception of people who were close relatives of famous people.[5] Thus, in the 14 years since *Dameron* not one court followed that decision. In 25 years there has been one public figure based on involvement in a public controversy. Obviously, this case could not have a substantial impact on defamation jurisprudence.

The issue on which petitioner seeks *certiorari* is not a significant one, despite his efforts to clothe it in all the raiments of the First Amendment. As best as petitioner and respondent could discover, there have been only three cases that decided whether someone was an involuntary public figures based on their involvement in a public controversy. These are *Dameron v. Washingtonian Magazine, Inc. supra, Khawar v. Globe Int'l, Inc.*, 19 Cal. 4th 254, 79 Cal. Rptr.2d 178, 965 P.2d 696 (Cal 1998) (holding that the characterization of involuntary public figure must be reserved for those individuals who satisfy both of *Gertz*'s supporting grounds, while rejecting claim of involuntary-public-figure status in context of assassination of Robert

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[5] In *Carson v. Allied News Co.*, 529 F.2d 209-10 (7th Cir. 1976), relied on by petitioner, the Court observed that "the plaintiffs admit that they are both 'public figures.'"

Kennedy), *cert. denied*, 119 S. Ct. 1760 (1999), and the instant case. Thus, the Fourth Circuit's statement that *Dameron* was "the leading case on involuntary public figure status," App. 56a, did not require defeating much competition. In the last year two cases have correctly interpreted the *dicta* in *Gertz*. In the earlier case, *Khawar*, this Court denied *certiorari*. [6] Since the instant case followed *Khawar*, there is even less reason to grant *certiorari* today. It is clear that the involuntary public figure concept is not a pressing issue requiring this Court's involvement.

Significantly, petitioner concedes that under the expansive view of involuntary public figure taken in *Dameron* that "several commentators have suggested that the involuntary category of public figures is no longer viable." Petition at 10-11 & n. 3. If this was the state of affairs with *Dameron* supposedly in ascendance, *Wells v. Liddy* will not have much of an impact. In any event, there seems to be no pressing need for this Court to disturb the lower courts in their work.

As the Fourth Circuit observed, the concept of an involuntary public figure had its origins in one sentence from *Gertz v. Welch*, 418 U.S. 323, 345 (1974): "Hypothetically, it may be possible for someone to become a public figure through no purposeful action of his own, but the instances of truly involuntary public figures must be exceedingly rare." App. 56a. The Fourth Circuit correctly observed that *Dameron* was tantamount to a reinstatement of the abandoned approach briefly embraced by this Court. *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971). *See*

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[6] Despite the Fourth Circuit's reliance on *Khawar*, *see* App. 59a, and the fact that this Court denied *certiorari* this year, the instant Petition for Certiorari does not mention the case. The other cases cited by petitioner were not holdings on anyone's status as an involuntary public figure. The other cases cited by petitioner involved the issue of voluntary limited-purpose public figures or were *dicta*.

App. 56a-60a. There is no basis for petitioner's claim that "The decision below is inconsistent with this Court's opinion in *Gertz*." Petition at 7.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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